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No. 270

# In the Supreme Court of the United States

October Term, 1962

[redacted]

v.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

[redacted]

[redacted]

[redacted]

# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 270

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented here is one concerned exclusively with the computation of excess profits tax liability under the Excess Profits Tax Act of 1950 (commonly referred to as the Korean War excess profits tax law). Under the provisions of Section 433(a) of the Internal Revenue Code of 1939, as added by that Act, the excess profits net income, upon which excess profits tax liability is computed, is the normal-tax net income increased or decreased by the adjustments specified in that Section. Section 433(a)(1)(G) provides, as one of the adjustments, that taxpayers may exclude from excess profits net income recoveries

of bad debts claimed as a deduction in prior non-excess profits tax years (i.e., years before 1940 or from 1945 to July 1, 1950). Another adjustment, also applicable here, is that set forth in Section 433(a)(1)(L) to the effect that banks using the reserve method of accounting for bad debts for purposes of their normal-tax shall, for excess profits tax purposes, take as a deduction the amount of bad debts actually becoming worthless during the year instead of a reasonable addition to the reserve. In accordance with this latter provision, the taxpayer, in computing its excess profits tax liability, substituted a deduction for the amount of bad debts actually becoming worthless during the years involved instead of the addition to the reserve which it had used as a deduction in computing its normal-tax net income. In doing so, however, the taxpayer did not include in its excess profits net income any recoveries of bad debts, regardless of the years in which they had been deducted.

The Commissioner asserted a deficiency in excess profits tax against the taxpayer on the ground that the taxpayer must take into account recoveries of bad debts for which deductions had been claimed in prior excess profits tax years. The court of appeals unanimously sustained the Commissioner's position and we believe that its decision was clearly correct. After examining the statute, as well as its legislative history, the court of appeals concluded that subparagraphs (G) and (L) of Section 433(a)(1) of the 1939 Code manifestly required the inclusion of re-

coveries of bad debts claimed as a deduction in prior excess profits tax years in computing excess profits tax liability. As it noted (Pet. App. 10), all other taxpayers were required to include such recoveries for excess profits tax purposes and nothing contained in the statute indicated a Congressional intent that banks using the reserve method of accounting for bad debts should be accorded more favorable treatment.

Although the decision below is in our view clearly correct, it is, we acknowledge, in direct conflict with the decision of the Fifth Circuit in *Commissioner* v. *Mercantile National Bank*, 276 F. 2d 58. Notwithficient importance to warrant review by this Court. The last taxable year to which the 1950 Excess Profits Tax Act applied was 1953, and we are aware of only two other pending cases, involving a total of less than $60,000 in taxes, which present the question involved in this case.[1] The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX.
*Solicitor General.*

SEPTEMBER 1962.

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[1] *National Bank of Washington* v. *United States*, Civil No. 2621 (W. D. Wash.) (involving some $6,000); and *Riggs National Bank* v. *United States*, No. 145-61 (Ct. Cls.) (involving some $52,000).

standing the conflict, however, the issue is not of suf-

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